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January 14, 2009

Via Facsimile and First Class Mail

Ross Johnson, Chairman
Honorable Members
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento CA 95814

Re: Proposed Regulation 18247.5
(Primarily Formed and General Purpose Committees)

Dear Chairman Johnson and Members of the Commission:

This letter provides comment on the FPPC's proposed rulemaking to define primarily formed and general purpose committees. I understand that a prenotice discussion of the issue was held on October 16, 2008, and that proposed FPPC Regulation 18247.5 will be considered again on January 15, 2009. The Los Angeles City Ethics Commission is deeply concerned that the proposed rule goes too far in protecting the interests of committees over the interests of the local voting public. For the reasons detailed below, we strongly urge you to vote against its adoption.

POLICY CONSIDERATIONS

We understand that the proposed regulation is designed to codify informal, non-binding advice that was provided in your *Moll* Advice Letter, No. A-97-080, and that the proposed regulation is intended to be more deferential to cities in that it sets lower definitional thresholds than the advice letter does. While we appreciate your efforts to provide clarity and certainty in the administration of the Political Reform Act (the PRA), we have very serious concerns about the policy implications of the proposed regulation and the laws from which it stems.

As we understand the proposed rule, a "city general purpose committee" would be specifically defined as one that meets two criteria: a) more than 50 percent of its total contributions and expenditures are made in just one city; and b) it spends less than $50,000 on state and county elections. This activity is calculated over one year if the committee is a major donor or independent expenditure committee or over three years if it is a recipient committee. We also understand the proposed rule to define a "primarily formed committee" as one that

makes more than 70 percent of its total contributions and expenditures—again, in either one year or three years, depending on the type of committee—on a single candidate, a single measure, or a group of either candidates or measures that are being voted on in the same election.

The proposed rule raises policy concerns that are both general in their application and specific to the administration and enforcement of local laws, such as those in the City of Los Angeles.

General Interests

1. *The proposed regulation ignores a charter city's constitutional authority to govern its own elections.*

The proposed regulation treads upon a charter city's ability to govern its own affairs. California's constitution grants charter cities the ability to govern their own municipal affairs. It specifically states that, "with respect to municipal affairs [a city charter] shall supersede all laws inconsistent therewith." Cal. Const. art. XI, § 5(a). This "home rule" provision establishes that, unless they are preempted by state law on a matter of statewide concern, the laws of a charter city prevail over inconsistent state laws.

The California Constitution does not define "municipal affair" or "statewide concern". However, as the California Supreme Court noted when upholding the public financing system in the City of Los Angeles, the constitution "sets out a nonexclusive list of four 'core' categories that are, by definition, 'municipal affairs'." *Johnson v. Bradley* (1992) 4 Cal.4th 389, 398, citing Cal. Const. art. XI, § 5(b). A city has plenary authority over these core municipal affairs, without regard to a matter of statewide concern. Among them are the "conduct of city elections" and the "manner" and "method" of electing municipal officers. *Id.*

The California Supreme Court has said that a matter is a statewide concern only if it addresses an issue "demonstrably transcending identifiable municipal interests" and identifies "a convincing basis for legislative action originating in extramural concerns". *Johnson, supra,* 4 Cal.4th at 399, 400, quoting *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1 at 17, 18. The Court has also stated that a charter city's ability to govern the manner of its elections is not limited to purely procedural issues and that the intent of the Legislature or the voters does not determine whether a matter is a municipal affair or a statewide concern. *Johnson, supra,* 4 Cal.4th at 403, 405.

The conduct of persons who participate in local elections is certainly a municipal affair that should be given appropriate deference by the state. Whether a person infuses money into city elections once or repeatedly, that person should be bound by the laws that shape the manner and method of electing municipal officers. By labeling some committees that participate in city elections as non-city committees, the proposed regulation interferes in municipal affairs and encourages those committees to ignore local laws.

It appears that the proposed regulation is designed to promote uniformity for committees that participate in elections statewide. However, the California Supreme Court has stated that uniformity is not, by itself, a justification for treating municipal elections as statewide concerns. *Johnson, supra,* 4 Cal.4th at 406. This position dates back at least 40 years in the California courts. For example, the court in *Mackey v. Thiel* (1968) 262 Cal.App.2d 362 stated that, despite the desirability for uniformity in some areas of statewide concern, "it is the people of the particular cities involved who are familiar with local conditions who are best able to regulate [local election] matters." 262 Cal.App.2d at 366, citing *Lawing v. Faull* (1964) 227 Cal.App.2d 23, 29. The proposed rule and the underlying sections of the PRA go too far in protecting the interests of committees over the interests of the local voting public.

2. *The proposed regulation applies a lesser standard of accountability to committees that make independent expenditures than it does to persons who contribute directly to candidates.*

One of the stated purposes of the PRA—indeed, the primary purpose it identifies—is that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Cal. Gov't Code § 81002(a). An informed citizenry is fundamental to good government. Citizens have a right to know the interests that affect their elections, and the disclosure laws that have been enacted by legislative bodies at all levels of government exist to serve that very purpose.

It is also essential to good government for public officials to "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." Cal. Gov't Code § 81001(b). To further that goal, many jurisdictions across the country have placed limits on campaign contributions. In Los Angeles, for example, contributors may not give more than $500 per election to a candidate for a city council seat or more than $1,000 per election to a candidate for the office of mayor, city attorney, or city controller.

These contribution limits apply to every person who contributes to a candidate in the City of Los Angeles. It does not matter whether the contributor has previously participated in city elections or participates in elections held by other jurisdictions. Whoever chooses to participate in a City of Los Angeles election by making campaign contributions to candidates must abide by the city laws that govern that activity.

The same principle should apply to those who choose to participate in a local election by making expenditures independently to support or oppose a local candidate or ballot measure. Those who use money in an effort to affect the outcome of a city election should be subject to city laws, regardless of whether they spend money in other jurisdictions. In contrast to this basic principle of fair play, however, the proposed regulation attempts to thwart a city's ability to inform its citizenry and inhibit improper practices when independent expenditures are made by committees that also make expenditures in other jurisdictions. If a committee can claim under the proposed rule that it is not a city committee, then it might also claim it is not subject to a

city's laws regarding independent expenditures—even when it is purposefully attempting to influence city elections.

Local Interests

As noted in one of the Fair Political Practices Commission's recent publications, "[t]he emergence of 'independent expenditures' has thwarted the will of the people, dramatically undermined California's campaign finance laws and doubtlessly influenced the outcome of numerous statewide and legislative elections." *Independent Expenditures: The Giant Gorilla in Campaign Finance* (2008), California Fair Political Practices Commission, p. 3. The report states that "full disclosure is crucial to ensuring the public's right to know which interests are funding political campaigns" and that "independent expenditures are the largest loophole contributors use to circumvent state limits on direct campaign contributions." *Independent Expenditures*, pp. 4, 5. The report recommends ways to provide greater public disclosure about independent expenditures, because "[t]he public has a right to know who is backing which candidates and how much money is being spent to elect them." *Independent Expenditures*, p. 7.

The state is not the only jurisdiction to feel these effects. Independent expenditures in local elections have also increased dramatically in recent years. In the City of Los Angeles, for example, independent spending in citywide races has grown exponentially, from $19,927 in 1997 to over $4.3 million in 2005.

Therefore, the concerns regarding independent expenditures at the state level also apply at the local level. Cities must be able to appropriately address the issue of independent expenditures in their elections, just as the state does in its elections. To that end, and based on their understanding of dynamics in our city's municipal elections, Los Angeles voters and elected officials have enacted the following laws regarding independent expenditures:

- Each independent expenditure of $1,000 or more must be reported to the Ethics Commission within 24 hours and must contain specific information about the independent expenditure, the committee making the expenditure, and the committee's contributions of $100 or more. LAMC §§ 49.7.26(A) & (B).

- Independent expenditure committees may not accept contributions in excess of $500 per person per calendar year that are solicited or earmarked to support or oppose city candidates. Similarly, a contributor may not contribute more than $500 per calendar year to a committee that supports or opposes a candidate or candidates for city office if those contributions are solicited or earmarked for those purposes. Los Angeles City Charter § 470(c)(5); LAMC § 49.7.24.

- Independent expenditures that involve more than 200 substantially similar pieces of campaign literature must be filed with the Ethics Commission in an electronic format, for posting on the Commission's Web site. Los Angeles Municipal Code (LAMC) § 49.7.11(C).

- The reproduction or distribution of a candidate's campaign materials must be reported as a non-monetary contribution to the candidate. LAMC § 49.7.25.

- When an independent expenditure involves 1,000 or more recorded telephone calls (or similar electronic transmissions) or the spending of at least $1,000 for radio or television ads regarding city candidates, a copy of the script or recording must be filed with the Ethics Commission within 24 hours of the first call or ad. LAMC § 49.7.26(E).

- Labor organizations and for-profit business corporations may not use money from their treasuries to make an independent expenditure to expressly advocate the election or defeat or a City candidate. They may, however, create political action committees that may make independent expenditures. LAMC § 49.7.26.2.

- Campaign communications must contain specific information, in specific formats, that identifies both the committee that paid for the campaign communication and the committee's major donors. LAMC § 49.7.26.3.

The City of Los Angeles also has constitutional authority over elections for the Los Angeles Unified School District Board of Education. Cal. Const. art. IX, § 16. Accordingly, in 2007, the district voters approved many of these same campaign finance measures for Board of Education elections. Los Angeles City Charter § 803.

These laws exist to serve the interests of our citizens and are essential to ensuring that full and adequate public disclosure is made about the interests that attempt to influence city elections. However, the proposed regulation would threaten these laws by hampering a city's ability to protect the integrity of its governmental systems. It would do so by stating that a committee is not a city committee so long as at least half of its expenditures and contributions are made in other jurisdictions or if it spends at least $50,000 in state or county elections (regardless of how much it spends in the city's elections). By creating these levels of activity, the regulation undermines the ability of local laws to assure sufficient transparency and accountability about these activities to the public.

1. The proposed regulation undermines our matching funds program.

As noted above, the City of Los Angeles requires 24-hour notice of independent expenditures made in city races. This law was enacted as part of the city's charter-mandated public matching funds program. If a voluntary matching funds program is to be attractive to potential candidates, it must foster confidence that a candidate will be able to mount a reasonable campaign against opponents. Toward that end, qualified city candidates who participate in our matching funds program become eligible for additional funding when independent expenditures are made either against them or for their opponents. If a response to an independent expenditure is going to be effective—particularly in light of the fact that most independent expenditures occur in the last month before an election—timely notice of independent expenditures is imperative.

The proposed regulation, however, would undermine this policy goal. If a committee makes independent expenditures affecting a publicly financed candidate but does not meet the proposed rule's definitional standards, the committee could argue that it is not subject to the city's 24-hour disclosure for independent expenditures. If that additional disclosure is not provided, a candidate may not know immediately—and might never know—when he or she has been the target of independent spending. As a result, a candidate who participates in the matching funds program would not be able to receive the full benefits designed to be provided to participating candidates to allow their timely response to independent expenditures that oppose them.

2. *The proposed regulation could encourage non-compliance with legitimate local independent expenditure laws.*

As identified above, the City of Los Angeles has enacted several laws that are designed to protect the integrity of city elections and foster public confidence in governmental processes by regulating independent expenditures and those who make them. However, the proposed rule threatens these laws. A general purpose committee could make as much as 50 percent of its contributions and expenditures in the City of Los Angeles—or simply spend just $50,000 in state or county elections—in a three-year period and yet would not be considered a city general purpose committee under the proposed rule. As a result, the committee might argue that it is not subject to local independent expenditure laws.

A committee that makes independent expenditures in City of Los Angeles elections but does not comply with the city's laws would deny the public the ability to access campaign literature on our Web site and to view the scripts of telephone calls and ads. It also would impede the public's ability to know of the full funding sources for campaign communications by not including that information on the communications, themselves. It would also circumvent the city's voter-enacted contribution limits by ignoring the $500 per-person cap on contributions to committees that make independent expenditures.

At best, the proposed rule creates confusion regarding whether a committee must comply with city election laws; and at worst, it attempts to eliminate a committee's responsibility under city law. To protect the interests of local voters and promote accountability in local campaigns, we oppose the proposed rule.

3. *The proposed regulation contains troubling provisions that weigh too heavily against the public interest.*

We disagree with the state's attempt to limit a city's ability to regulate independent spending in its own elections. Accordingly, we oppose the proposed regulation in its entirety as overreaching. Our opposition is philosophical and categorical. In addition, there are two specific provisions in the proposed regulation that we believe are particularly troubling and warrant separate mention here.

First, the three-year calculation window for recipient committees is far too long. In the City of Los Angeles, independent expenditures usually occur every four years, in our races for mayor, city attorney, and city controller. Independent expenditures also typically occur in the last two months before an election. Under a three-year calculation period, a recipient committee that spends 100 percent of its resources on one or more of our races could avoid classification as a city general purpose committee simply by spending the same amount on other elections over the previous two years. That is an inequitable result, because the committee behaved as a city general purpose committee for the entire period of time that is most critical to our elections. A calculation window that is significantly shorter and takes city election cycles—perhaps, even, the PRA's own definition of "election cycle" (the 90 days prior to an election)—into consideration would lessen these concerns. *See* Cal. Gov't Code § 85204.

Second, the $50,000 default provision is both too stringent and unnecessary. Many millions of dollars are spent on independent expenditures today. Spending $50,000 on one or more state or county elections would be a way for committees to avoid being classified as a city committee. In addition, more money is typically spent on state and county elections than on city elections. For example, the 25 committees that made more than 70 percent of the independent expenditures in state elections between 2001 and 2006 spent from $749,974 to $9,855,582 each, for a total of $63,209,719. *Independent Expenditures, supra,* pp. 11-25. In contrast, all independent expenditures in City of Los Angeles elections since 1989 have totaled just over $11 million and have averaged less than $25,000. The dollar differential is vast, and a default threshold of only $50,000 is heavily weighted against committees being classified as city committees.

Not only is the $50,000 threshold far too low, a default provision is entirely unnecessary. It is sufficient simply to say that a city general purpose committee is one that spends at least 51 percent of its resources in one city. A definition that is strictly percentage-based applies consistently to all committees, regardless of the balances in their bank accounts. It also eliminates confusion and the additional calculations that would be required to determine whether the threshold has been met.

CONCLUSION

Local elections are municipal affairs that are best understood and administered by the local governments that are accountable to the citizens whose lives are directly affected by the outcomes of those elections. City laws regarding persons who participate in city elections should apply to every committee that participates in a city election, regardless of its activity in other jurisdictions. We strongly oppose proposed FPPC Regulation 18247.5, because it does not protect a municipality's ability to manage its own affairs and because it threatens to obscure the information the public needs in order to make informed decisions and to hold its elected officials accountable. We urge you to assist cities in addressing the "giant gorilla in campaign finance" by voting against the proposed rule.

Thank you for soliciting input regarding the proposed regulation. We appreciate Senior Commission Counsel Hyla Wagner's assistance in discussing the issue with us. We would like to attend your meeting on January 15. However, due to severe budgetary constraints, we are unable to be there. This is a significant issue, about which we feel very strongly; and we encourage you to discuss the proposed regulation at a meeting held near Los Angeles, so that we can personally participate in this process.

Please do not hesitate to contact me if you have questions or if we can provide additional information.

Sincerely,

LeeAnn M. Pelham
Executive Director

cc: Roman Porter, FPPC Executive Director
Hyla Wagner, FPPC Senior Commission Counsel